

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In the Matter of:

**1998 Biennial Regulatory Review – Part 76
Cable Television Service Pleading and
Complaint Rules**

CS Docket # 98-54
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY ON PETITION FOR RECONSIDERATION

EchoStar Communications Corporation (“EchoStar”), pursuant to 47 C.F.R.

§ 1.429 and the Commission’s Public Notice of EchoStar’s Petition for Reconsideration (“Petition”),¹ replies to the Opposition to Petition for Reconsideration (“Opposition”) filed by Fox Sports Net LLC (“Fox”). EchoStar also notes that Ameritech New Media, Inc. has filed comments fully supporting EchoStar’s Petition.² EchoStar’s Petition concerns a change to the Commission’s statute of limitations rules adopted in the above-captioned rulemaking; under that change, the one-year statute of limitations for program access complaints is triggered by an offer only where there is no contract between the programming vendor and the distributor.³

¹ Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 64 Fed. Reg. 15755 (Apr. 1, 1999).

² Ameritech New Media, Inc. Comments in Support of Petition for Reconsideration (Apr. 16, 1999) (“Ameritech Comments”).

³ Compare 47 C.F.R. § 76.1003(r)(2) (1998) (permitting a complaint within one year of the time that “[t]he satellite cable programming or satellite broadcast programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart”) (emphasis added) with 47 C.F.R. § 76.1003(f)(2) (permitting a complaint within one year of the time that “[t]he satellite cable programming or satellite broadcast programming vendor offers to sell programming to the

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Fox does not argue that the Commission, in adopting the change to the Commission's Part 76 statute of limitations rules that EchoStar challenges, met the notice and comment requirements of Section 4(b) of the Administrative Procedure Act ("APA").⁴ Indeed, it is very clear that the Commission did not meet APA requirements.⁵ Fox responds to the EchoStar Petition, however, by arguing that the APA requirements do not apply, because the new rule at issue is an "interpretive rule" covered by the exemption of Section 4(b)(A) of the APA.⁶ This argument must fail.

Contrary to Fox's arguments, applicable APA precedent does not indicate that the amendments to the Part 76 statute of limitations rules in the Report and Order⁷ constitute an "interpretive rule." A leading treatise succinctly states the distinction between substantive and interpretive rules under the APA:

In general, an interpretive rule is an important but nonbinding agency opinion of how a statute should be viewed. Unlike a substantive rule, which sets out rights and obligations, an

complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart, and such offer to sell programming is unrelated to any existing contract between the complainant and the satellite cable programming or satellite broadcast programming vendor") (emphasis added).

⁴ 5 U.S.C. § 553(b) (requiring notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved").

⁵ See Petition, at 3-5; Ameritech Comments, at 2-4.

⁶ 5 U.S.C. § 553(b)(A).

⁷ 1998 Biennial Review – Part 76 Cable Television Service Pleading and Complaint Rules, Report and Order, CS Dkt. No. 98-54, FCC 98-348 (Jan. 8, 1999) ("Report and Order").

interpretive rule merely advises the public of a statute's meaning or the manner in which it is to be applied.⁸

A recent Supreme Court decision also states this advisory function of interpretive rules.⁹

Similarly, in construing the closely related distinction between substantive rules and policy statements, the D.C. Circuit recently rejected a Commission claim regarding the nature of a forfeiture rule and found a violation of the APA:

The Commission claims that the standards are only general statements of policy exempt from the notice and comment obligation that the APA imposes on the adoption of substantive rules. The distinction between the two types of agency pronouncements has not proved an easy one to draw, but we have repeatedly stated that it turns on an agency's intention to bind itself to a particular legal policy position.¹⁰

⁸ Stein, Mitchell & Mezines, Administrative Law § 15.07[3] (1999) (citations omitted) (emphasis added).

⁹ See Shalala v. Guernsey Memorial Hosp., 514 U.S. 87, 99 (1995) (the rule at issue "is a prototypical example of an interpretive rule "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers'"") (citation omitted); see also Phillips Petroleum Co. v. Johnson, 22 F.3d 616 (5th Cir. 1994) ("Generally speaking, it seems to be established that 'regulations,' 'substantive rules,' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.") (quoting Brown Express, Inc. v. United States, 607 F.2d 695 (5th Cir. 1979)), cert. denied, 514 U.S. 1092 (1995).

¹⁰ United States Tel. Ass'n v. FCC, 28 F.3d 1232, 1234 (D.C. Cir. 1994) (citations omitted); see also Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997) ("[t]he primary distinction between a substantive rule ... and a general statement of policy ... turns on whether an agency intends to bind itself to a particular legal position"); Natural Resources Defense Council, Inc. v. EPA, 22 F.3d 1125, 1146-47 (D.C. Cir. 1994) (contrasting earlier non-binding EPA rules with rules at issue and stating that "any rules setting forth the mandatory ... obligations ... are legislative in character, and the EPA probably was required to promulgate such rules only through APA rulemaking procedures") (original emphasis).

Under this clear and up-to-date authority, there can be no question that the amendments to the Part 76 statute of limitations rules are covered by the APA notice and comment requirements. The Commission plainly intends this change to its codified rules to be ***binding*** on potential Part 76 complainants. Accordingly, the rule change is covered by the notice and comment requirement of Section 4(b) of the APA. Merely by calling the rule change an “interpretive rule,” the Commission and Fox do not make it so. It is striking that, on this very frequently litigated question of administrative law, Fox had to reach back and try to find support from two 1970s district court decisions and a 1981 Commission decision,¹¹ which simply do not comport with current law.

Furthermore, Fox argues that the change in the Part 76 statute of limitation rules adopted in the Report and Order furthers the goals of speedy resolution of complaints and encouraging renegotiation of program access contracts.¹² This is simply not the case. The actual effect of the Commission’s new rule seems to be to eliminate a class of program access complaints and to allow programming vendors to avoid the obligation to negotiate in good faith regarding programming covered by existing contracts (because discriminatory offers in such negotiations might now be effectively immune from a Part 76 complaint). Such effects are hallmarks of a substantive rule change.

Fox’s other argument – that EchoStar’s Petition is an improper “collateral attack” on the decision in EchoStar Communications Corporation v. Fox/Liberty Networks, LLC (“Fox

¹¹ See Opposition, at 5-6 (citing Continental Oil Co. v. Burns, 317 F. Supp. 191 (D. Del. 1970); Spring Mills, Inc. v. CPSC, 434 F. Supp. 416 (D.S.C. 1977); Amendment of Part 22 of the Commission’s Rules, 85 F.C.C.2d 910 (1981)).

¹² See Opposition, at 2-3, 5 n.19.

Sports”)¹³ – has no bearing on the APA issues raised by EchoStar’s Petition. EchoStar acknowledges that the Petition relates to the same matters at issue in the Fox Sports case.¹⁴ In fact, the Commission’s after-the-fact action to change its statute of limitations rule in the rulemaking has a profound implication for the adjudicatory Fox Sports proceeding, which is pending before the Bureau on reconsideration. The Commission action proves that the Cable Services Bureau erred in believing that, under then existing Commission rules, the one-year statute clearly was not triggered by certain offers. Even if one could accept the Commission’s position that the rule change was a “clarification,” the Commission action shows that its rules were, at a minimum, not clear at the time the Bureau interpreted them. In any event, the fact that these issues are pending in both the present proceeding and Fox Sports in no way allows the Commission to justify its decision in Fox Sports by issuing a rule in this proceeding in a manner that violates the APA.

EchoStar also notes that the Commission’s new rule appears to be broader than is indicated by its proffered explanation for the rule: that “[t]his amendment is intended to clarify that an offer to amend an existing contract that has been in effect for more than one year does not reopen the existing contract to complaints that the provisions thereof are discriminatory.”¹⁵ The language of the new rule, however, seems to sweep more broadly and to also bar claims that the subsequent offer itself was discriminatory. In this respect, EchoStar notes that the decision of the Bureau in Fox Sports was based on an apparent misunderstanding. As EchoStar has

¹³ DA 98-2153 (rel. Oct. 28, 1998).

¹⁴ See Petition, at 3 n.10.

¹⁵ Report and Order, ¶ 18 (emphasis added).

explained in its Petition for Reconsideration, the Bureau ignored EchoStar's claim that Fox's subsequent offer itself (not just the existing contract) was discriminatory.¹⁶

In conclusion, the APA requires the Commission to rescind its amendments in the Report and Order to the statute of limitations provisions of the Part 76 rules, pending a notice and comment rulemaking proceeding in which such amendments can be properly considered in a manner consistent with the APA.

Respectfully submitted,

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¹⁶ See Petition of EchoStar Communications Corporation for Reconsideration, File No. CSR-5138-P (Nov. 27, 1998).

CERTIFICATE OF SERVICE

I, Christine A. Delp, hereby certify that the foregoing Reply on Petition for Reconsideration was served this 26th day of April 1999, by hand delivery (or first class mail where indicated by an asterisk (*)) on the following:

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